United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by
Jerome F. O'Neill

Docket No. **77-1025**

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

NIKOLAS PANTELEAKIS,
a/k/a Nick Pontel

Appellant

Appeal from the United States District
Court for the District of Vermont

BRIEF FOR THE UNITED STATES

GEORGE W.F. COOK
United States Attorney

JEROME F. O'NEILL
JILL A. JACOBSON
Assistant U.S. Attorneys
District of Vermont

TABLE OF CONTENTS

TABLE OF CASES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

NIKOLAS PANTELEAKIS,
a/k/a Nick Pontel

Appellant

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

An indictment bearing criminal number 76-9, filed February 19, 1976, charged the defendant Nikolas Panteleakis, together with William Scott in three counts with receipt of stolen securities valued at in excess of $5,000 which were moving as interstate commerce from the State of Pennsylvania to the State of Vermont knowing they had been stolen, converted and taken by fraud in violation of 18 U.S.C. § 2315 (Count I); transporting in interstate and foreign commerce from the State of Vermont

to the Province of Quebec, Canada securities valued at in excess of $5,000 knowing them to have been stolen, converted and taken by fraud in violation of 18 U.S.C. § 2314 (Count II);* and conspiring with John Lavers, Larry Thibeault, named as co-conspirators, and William Scott, to commit the acts described in Counts I and II, in violation of 18 U.S.C. § 371 (Count III).

The trial of Nikolas Panteleakis began on June 22, 1976 and on June 25, 1976 the jury returned a verdict of guilty on all counts.

On November 9, 1976 Panteleakis was sentenced to six months in the custody of the Attorney General on Count I, the imposition of sentence was suspended on Counts II and III, with the sentence on Counts II and III to run consecutive to that on Count I and include a three year probationary period. The execution of the sentence on all counts was stayed pending appeal.

---

* Panteleakis also was charged in both counts with aiding and abetting the violation pursuant to 18 U.S.C. § 2.

STATEMENT OF ISSUES

I WHETHER THE DISTRICT COURT CORRECTLY EXCLUDED COERCION AS A DEFENSE.

II WHETHER THE DISTRICT COURT CORRECTLY PREVENTED THE JURY FROM DISREGARDING ITS INSTRUCTIONS AND OPERATING WITHOUT REGARD TO THE LAW AND FACTS.

STATEMENT OF FACTS

In the fall of 1974 Nikolas Panteleakis was operating a restaurant known as the Maverick in Brattleboro, Vermont.(Tr* 26, 27, 259-260). Later that year Larry Thibeault, who had worked for him previously, and William Scott reached an agreement with Panteleakis to promote a dinner club at his restaurant; they arrived in Brattleboro in December, 1974. (Tr 26, 158) As part payment for the restaurant promotion, and because he owed Thibeault money for past work, Panteleakis took care of motel, food and drink tabs for Scott and Thibeault at the Maverick. (Tr 173-75)

Shortly after Thibeault and Scott arrived in Brattleboro, an individual by the name of Kermit White approached Larry Thibeault with an offer to sell stolen bonds, an idea which Thibeault passed on to Scott. (Tr 28-30, 161) White later brought a sample of the available bonds, United States Savings Bonds,** to the

---

* Tr. - Transcript. Other references are GA - Government Appendix, DA - Defendant's Appendix, and GX - Government Exhibit.

** When the bonds ultimately were delivered they also were made up in part of stock in the Western Pennsylvania National Bank. GX 8-18.

restaurant for Thibeault, Scott, Panteleakis and a fourth individual named John Lavers to look at. (Tr 30-31) White agreed to sell them the bonds, with a face value of over $60,000, for $500. (Tr 31-32, 53-54, 56, 137-138, 163-164, GX 8-18) The four purchasers hoped to get a return of 25-75 cents on the dollar for the bonds. (Tr 32) They planned to split the proceeds and use the money to open a restaurant in Massachusetts. (Tr 32, 54, 136) Panteleakis initially borrowed the $500 necessary for the purchase of the bonds but he spent that money prior to the purchase from White. (Tr 166) This forced each of the four men to put up $125, to get the $500 required. (Tr 220-21)

Thibeault and Scott received the bonds from White in a room at the Maverick, and gave him the $500. (Tr 52, 167) Scott, Thibeault, Lavers and Panteleakis examined the bonds and then delivered them to Lavers. (Tr 33, 52, 139, 167, 269) All of the parties were aware from the face of the bonds that the bonds had originated in Pennsylvania. (GX 8-18, Tr 100, 101, 140)

There were various discussions about how the bonds were to be disposed of; ultimately, it was decided that John

Lavers would dispose of them in Canada.* (Tr 139)

Panteleakis was arrested by the F.B.I. in April, 1976, in Massachusetts. (Tr 78) During an interview following his arrest, he maintained for several minutes that his real name was Nick Pappas. (Tr 87) He stated that he knew of the stolen bonds and had seen a $1,000 bond at the restaurant in December 1974. (Tr 83-84) He indicated that he was told by Scott, Thibeault and Lavers that they were going to make a lot of money with the bonds and that they knew that the bonds were stolen. (Tr 83-84) Panteleakis indicated that the last time he had seen the bonds was when Thibeault, Scott and Lavers had them in the kitchen area of the restaurant. (Tr 92-93) He also stated that he knew the bonds were stolen, that they had come from Kermit White, but that he had nothing to do with them. (Tr 92-99) At no time did he mention that he had become involved with the bonds much less that he had been coerced or blackmailed by others into participation in

---

* Lavers was arrested in Canada after bringing the bonds across the United States border through Vermont in January, 1975. (Tr 144, 238-40) In addition, the parties stipulated as to how the bonds had been taken by fraud from a woman in Pennsylvania in 1973. (Tr 248-50)

the receipt or disposition of the bonds.*

---

* Panteleakis' only claim with respect to blackmail consisted of the allegation that Thibeault and Scott threatened to turn him in on bad check and labor charges in Massachusetts if he did not supply them with rooms, meals and liquor and bail money; Thibeault and Scott denied these allegations to the extent they were asked about them. (Tr 65-61, 75-76, 211, 215, 265; Tr 266-69, GA 1-4) Nowhere in defendant's opening statement or request to charge was this claim ever raised. (Tr 23-24; Tr 313, 337-51) The testimony of the defendant himself did not even support such a claim. (Tr 268-72, GA 3-7) The only reference to a claim of blackmail is found in his counsel's closing argument, as he attacked the credibility of Scott and Thibeault generally. (Tr 342-43, GA 10-11)

ARGUMENT

I

THE DISTRICT COURT CORRECTLY EXCLUDED COERCION AS A DEFENSE

Defendant argues in this appeal that the District Court's supplemental instructions in response to a note from the jury were improper. The jury raised a question of coercion as a defense; the Judge responded, after consultation with counsel, that there was no evidence that defendant was coerced to join the conspiracy. He then repeated his earlier instructions on knowledge, willfulness, and conspiracy. Defendant cites numerous cases dealing with the ability of the trial court to comment on the evidence, actions of a Judge which might be construed as directing a verdict of guilty, and reinstruction of the jury. The Government submits that most of these cases have no bearing on the issues to be determined in this appeal. The Government believes that the questions for determination by this Court are: 1) whether a coercion instruction should have been given; and 2) whether the jury should have been allowed to disregard the instructions originally given by the Court.

The defendant is attempting to raise an issue on appeal that was not properly before the trial court. He contends that once the jury submitted a note indicating

its concern with blackmail and coercion, the Court should have allowed it to consider these issues. However, because the defendant presented no evidence of coercion, the trial judge properly so advised the jury. Thus, defendant's contentions are without merit. The only claim made by defendant with respect to potential blackmail during the trial was in attacking the credibility of two of the Government's witnesses during closing argument. (Tr 342-43, GA 10-11) In fact, although defendant now complains of the Court's having indicated to the jury that there was no evidence of coercion, when the issue was first raised by the jury defendant's counsel agreed that "there is no direct evidence at all that says he was coerced into the 'conspiracy'. . . ." (Tr 390, DA 35) Rather, counsel indicated his belief that the jurors were "questioning specific intent and the willfull nature of his specific intent." Id.*

Defendant's only request to charge dealt with

---

* The Judge reread his instructions with respect to knowledge and willfulness. (Tr 394-96, DA 39-41) The Court also reread its conspiracy instructions when the jury indicated it thought this would be helpful. (Tr 396-402, DA 41-47)

the conspiracy issue and made no mention of coercion. (Tr 313, GA 8) Under the circumstances, the Government submits that the failure of the defendant to raise the coercion defense or to request a coercion instruction precludes this Court from considering that issue, although this is not the way defendant frames the issues before this Court. F.R.Cr.P. 30.

Since the trial court was not commenting on the evidence in the traditional sense, but was attempting to assist the jury in its deliberations,* the Government believes that the only issue which this Court can determine is whether despite the Rule 30 waiver, the defendant was entitled to a coercion instruction. This was in effect what the defendant was seeking. (Tr 391, DA 36)

---

* Even to the extent that the Court was commenting on the evidence, it was accurately and fairly doing so, which is of course entirely permissible. See United States v. Tourine, 428 F.2d 865, 869-70 (2d Cir. 1970), cert. denied, 400 U.S. 1020 (1971).

In determining whether a coercion instruction should have been given, the first area for examination is the facts brougnt out before the District Court. The Government's witnesses categorically denied blackmailing Panteleakis. Nevertheless, defendant claimed that he was blackmailed by two of the Government's witnesses who allegedly threatened to "turn him in" on bad check charges in another state if he did not provide them with free room and board. (Tr 265-66) There was no indication, much less any evidence, during the trial that this alleged blackmail coerced the defendant into participation in the violations of which he was found guilty.*

---

* Defendant filed a post trial motion seeking a new trial on the ground of newly discovered evidence, including in part the discovery of a witness who would testify that the defendant had told him during the relevant period of time that he was being forced to go in on the bonds because he was being blackmailed. This factual allegation was submitted without any affidavits and was vigorously disputed by the Government in its response. The Court denied a new trial motion and this point has not been pursued on appeal. See Doc. 22, 23, and 28. Such evidence would of course have totally altered defendant's theory of the case.

Even to the extent that defendant had relied upon the alleged blackmail as coercing him into participating in the conspiracy, he would not have been entitled to an instruction on coercion. The federal standard is as follows:

> Coercion which will excuse the commission of a criminal act must be immediate and of such nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. One who has full opportunities to avoid the act without danger of that kind cannot evoke the doctrine of coercion and is not entitled to an instruction submitting that question to the jury.

Shannon v. United States, 76 F.2d 490, 493 (10th Cir. 1935). As this Court has recently stated, not only must there be fear, but "the fear must be more than a general apprehension of danger, particularly if one has the chance to escape or to seek the protection of the Government." United States v. Housand, No. 76-1156 (2d Cir. Feb. 25, 1977) 2011. See, e.g., United States v. McClain, 531 F.2d 431, 438 (9th Cir. 1976); United States v. Stephenson, 471 F.2d 143 (7th Cir. 1972), cert. denied, 421 U.S. 950 (1973); D'Aquino v. United States, 192 F.2d 338, 357-58 (9th Cir. 1951), cert. denied, 343 U.S. 935 (1953).

Coercion other than physical coercion does not entitle a defendant to take advantage of this defense. As stated by the Court in United States v. Palmer, 458 F.2d 663, 665 (9th Cir. 1972):

> But even if the trial judge accepted Palmer's contention that he reentered the U.S. in 1970 to avoid a grevious financial loss, this would not constitute the compulsion or duress which would excuse criminal conduct. Fear of harm to property is not enough in order for compulsion or duress to provide such a defense, it must be such as to induce a well-founded fear of immediate great bodily harm or death.

In addition, courts have rejected the argument that fear of imprisonment or possible prosecution constitutes coercion. In United States v. Birch, 478 F.2d 808 (4th Cir. 1972), cert. denied, 411 U.S. 931 (1973) the defendants were convicted of falsely making documents and leave orders while in Germany to allow them to get out of the country and escape imprisonment there. They attempted to claim coercion in view of their plight which would negate the intent to defraud required under the statute. The District Court excluded evidence of defenses based on justification and duress, noting that the defendants concern over the consequences of the judgment of the German court did not justify the resort to crime. Id. at 812-13. A similar conclusion has been reached where the court found that a threat of prosecution or imprisonment was not sufficient coercion to excuse the commission of a crime. Phillips v. United States, 334 F.2d 589, 590 (9th Cir. 1964), cert. denied, 379 U.S. 1002 (1965).

Furthermore, the purported defense must have some support in the evidence before the defendant is entitled to an

instruction on his theory. In United States v. Garner, 529 F.2d 962, 969-70 (6th Cir.), cert. denied, ___ U.S.___ (1976), the court held that such instruction should have been given where there was testimony by the defendant and by another witness that she had been coerced in connection with one of the counts in the indictment. The request for a coercion instruction has been specifically rejected when there was no evidence to support it. United States v. Buchanan, 529 F.2d 1148, 1153 (7th Cir. 1975), cert. denied, 96 S.Ct. 1725 (1976). See United States v. Swinton, 521 F.2d 1255 (10th Cir. 1975), cert. denied, 424 U.S. 918 (1976).

An additional problem with the application of a coercion defense here is that although the defendant sought to take advantage of such a defense, he never claimed any such theory until the jury raised the issue. The facts here are analagous to those present in United States v. Larsen, 525 F.2d 444 (10th Cir. 1975), cert. denied, 96 S.Ct. 859 (1976), where the defendant raised consent as a defense in a Dyer Act prosecution. Although there was some evidence the defendant had been drinking, he neither raised this as an issue at the trial, nor requested an instruction on it. His counsel conceded that intoxication had nothing to do with the case. Id. at 447. The Court of Appeals, in affirming the conviction noted that the claimed defense

was factually lacking in the record, and further that this defense was contrary to the trial defense theory. Therefore, the Court would not permit this "change of pace" on appeal. Id.

Defendant here attempts a similar move, having failed in his basic defense theory; however, he lacks both a sufficiently early claim of it and a factual basis for it.

II

THE DISTRICT COURT CORRECTLY PREVENTED
THE JURY FROM DISREGARDING ITS INSTRUCTIONS
AND OPERATING WITHOUT REGARD TO THE LAW AND FACTS

Defendant sought to have the Court say nothing with respect to the blackmail aspect of the jury's question. Had the Court remained silent, the jury would have been allowed to return a verdict based on a misunderstanding of the court's instructions. The failure of the District Court to instruct the jury that there was no evidence of coercion to participate in the conspiracy would have allowed the jury to operate under a nullification theory, which of course it may not do. United States v. Dougherty, 473 F.2d 1113, 1130-38 (D.C. Cir. 1972). The defendant was not entitled to have the Court ignore the jury's misunderstanding, and thus condone it. Nor would he have been entitled to an instruction to the jury that it has the power to acquit him regardless of the evidence of his guilt. See United States v. Simpson, 460 F.2d 515 (9th Cir. 1972). Defendant here was seeking an irrational verdict, to which hewas not entitled. United States v. Sawyer, 423 F.2d 1335 (3d Cir. 1970).

Under the circumstances the Government submits that the District Court wisely exercised its judgment in guiding the jury through the use of appropriate supplemental

instructions. These instructions brought to the jury's attention the applicable standards to be applied in their deliberations and excluded a defense which was not supported by the evidence.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

GEORGE W.F. COOK
United States Attorney for
the District of Vermont
Attorney for the United
States of America

JEROME F. O'NEILL
JILL A. JACOBSON
Assistant U.S. Attorneys

April 11, 1977

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

NIKOLAS PANTELEAKIS,
a/k/a Nick Pontel

Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have this 11th day of April, 1977, mailed two copies of the foregoing Brief for the United States to Peter M. Cleveland, Esq., counsel for Appellant, postage prepaid.

Jill A. Jacobson

JILL A. JACOBSON
Assistant U.S. Attorney